No. 10,775

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

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JESSIE F. KING and GEORGE C. KING,
Appellants,

vs.

J. H. YANCEY, doing business under the firm and/or fictitious name of Yancey Insulation Co.,
Appellee.

Upon Appeal from the District Court of the United States for the District of Nevada.

REPLY BRIEF FOR APPELLANTS.

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APPELLEE'S STATEMENT OF THE CASE.

The motion to dismiss takes the place of the old demurrer. It was made to the complaint filed in the District Court. No motion was made to strike any part of that complaint. Appellants are entitled to have taken as proved every fact stated in the complaint and essential to recovery, and every inference of fact that can be properly drawn therefrom, and appellants are entitled to the benefit of all presumption.

Appellee's restatement of the case fails to include many of the important facts, excludes all the inferences of fact, and gives the appellants no benefit of any presumption.

APPELLEE DISAGREES WITH ERIE RAILROAD CO. v. TOMPKINS, 304 U. S. 64.

Of course, *Erie Railroad Co. v. Tompkins* is a milestone in the growth and development of American jurisprudence. Appellee is, of course, entitled to disagree with that case, but presently must find himself bound by that decision.

The legal issues involved not being covered by the Federal Constitution or by Acts of Congress, the law to be applied is the law of Nevada as declared by its highest Court.

Applying this doctrine we find that the highest Court in Nevada has established the following principles:

1. The duty owed to a licensee is (a) not to wantonly or willfully injure him, and (b) to exercise due care to prevent his injuries after his presence in a place of danger is discovered.

2. To an express invitee Yancey owed the duty of ordinary care.

3. The wife engaged in something for the benefit of Yancey, even without the express invitation of the husband, became an invitee by implication.

From the facts appearing in the complaint the inferences that may be drawn therefrom, and the presumptions to which appellants are entitled, it would seem very clear that the following results ensue:

1. Appellee, through his servant, was guilty of wanton negligence as that term is construed in *Crosman v. Southern Pac. Co.,* 194 Pac. (Nev. 1921) 839.

2. It certainly cannot be successfully controverted that Yancey's servant knew of the presence of the wife, and by his directions to her, failed to exercise due care. The opinion of the District Court finds the negligence to exist.

3. Where the wife had only one purpose, as it appears from the complaint, and that to aid in the prosecution of Yancey's business by making possible the husband's long and arduous trip for the benefit of Yancey, it would seem equally clear that the wife was an express invitee by implication, even if for the purpose of this thought it were not determined that she was expressly an invitee by the invitation of her husband.

APPELLEE'S POINT THAT: "MRS. KING WAS GUILTY OF CONTRIBUTORY NEGLIGENCE IN WALKING INTO A DARK OPENING."

In the first place such is not the fact. As stated in the complaint there was a considerable amount of light, in that the light coming over the partition lighted the upper portions of the walls of the stairway

giving a complete picture of what appeared to be the walls of the toilet.

In *Nevada Transfer & Warehouse Co. v. Peterson,* 99 Pac. (2d) (Nev.) 633, the Nevada Supreme Court, at page 639, said:

> "We think the question of Mrs. Peterson's negligence was for the jury. As previously stated, she did not proceed in total darkness. The reflection of light in the receiving room was sufficient to enable her to see the floor, but it looked level in front of her. She was corroborated as to this deceptive appearance by her husband, who testified 'I could see very high up. You could see the floor but you could not possibly see the hole unless you knew it was there.' "
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> * * * * * * *
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> "On the same evidence the jury had the right to find that the danger was not obvious. Also the question as to whether the danger was known to Mrs. Peterson on account of her knowledge of the presence of the unguarded runway, in the receiving room, was for the jury * * *"

Again at page 638, the Nevada Court said:

> "Appellant presents cases to the effect that it is contributory negligence, as a matter of law, for a person to proceed in darkness in unfamiliar surroundings, when he is unaware of what the darkness contains. But we think these cases may be distinguished from the instant one. The jury could well have found that Mrs. Peterson did not enter or proceed in a room clothed in total darkness."

In *Seavy v. I.X.L. Laundry Co.,* 108 Pac. (2d) (Nev.) 853, the Supreme Court of Nevada considered this same subject at page 858:

> "The respondent did not proceed in total darkness. The reflection of light in the room was sufficient for him to see the toilet bowl and to proceed to it. (In proceeding he fell into a hole in the floor just as the wife fell into the stairway.) We think, under all of the circumstances here, that the question was one for the trial court to determine, and on the evidence presented the court was justified in finding that the danger was not obvious." (Interploation of facts of *Seavy* case supplied.)

CONCLUSION.

It is respectfully submitted that the judgment of the District Court should be reversed and the action remanded.

Dated, Reno, Nevada,
August 21, 1944.

Respectfully submitted,
CLYDE D. SOUTER,
Attorney for Appellants.